No. 96-1251

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

GARY WAYNE BROCK,

Petitioner,

vs.

CATERPILLAR INC.; GREAT WESTERN COAL, INC.; GREAT WESTERN COAL (KENTUCKY), INC.; OLD REPUBLIC INSURANCE COMPANY; ACTING DIRECTOR OF SPECIAL FUND,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT, CATERPILLAR INC., IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals violated the Seventh Amendment by distinguishing *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991)?

2. Whether in a product liability action the Sixth Circuit Court of Appeals violated the Seventh Amendment by failing to order a new trial after finding that there was no direct evidence that the product in question was defective?

3. Whether the Sixth Circuit Court of Appeals applied the *Daubert* standards to non-scientific testimony?

4. Whether under both federal and state standards of review the appellate court is required to consider all of the evidence in reviewing the motion for judgment as a matter of law?

LIST OF PARTIES

The only active parties in the appellate proceedings are Respondent, Caterpillar Inc., and Petitioner, Gary Wayne Brock. The parties before the trial court additionally included intervenors Old Republic Insurance Company, (the workers' compensation carrier for Brock's employer, Nally and Hamilton Enterprises), and Robert Whittaker, Acting Director of Special Fund, both of whom asserted claims for workers' compensation benefits paid and to be paid to Brock. Caterpillar Inc. joined Great Western Coal, Inc. and Great Western Coal (Kentucky), Inc. as third party defendants, alleging that the accident was caused in part by the failure of the third party defendants to observe routine care and maintenance of the D9H bulldozer. Great Western Coal (Kentucky), Inc. was dismissed by Agreed Order and Great Western Coal, Inc. was dismissed after a discharge in bankruptcy.

The trial court included Gary Wayne Brock, Caterpillar Inc., Nally and Hamilton Enterprises, and Great Western Coal, Inc. in the apportionment of fault instruction. The derivative claims asserted by Old Republic Insurance Company and Robert Whittaker, Acting Director of Special Fund, were held in abeyance and have so continued pending resolution of the appellate proceedings.

Respondent, Caterpillar Inc., has no parent companies. Its non-wholly owned subsidiaries include Cyclean, Inc., Advanced Filtration Systems, Inc., Health Plan of Central Illinois, Inc., Caterpillar Commercial N.V., AO Nevarnash and UNOC Equipment and Supply, LLC.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision and Statute Involved	1
Counterstatement of the Case	2
Reasons for Denying the Petition	8
I. The Sixth Circuit Distinguished The Precedent Relied Upon By Brock.	10
II. The Sixth Circuit Did Not Order A New Trial Because The Evidence Was Insufficient To Support The Jury Verdict.	12
III. The Sixth Circuit Did Not Apply The *Daubert* Standards To Non-Scientific Evidence.	14
IV. Both The State And Federal Standards Of Review Require A Review Of The Evidence In Its Entirety.	15
Conclusion	19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 79 L.Ed. 1636, 55 S.Ct. 890 (1935) 13

Boyle v. United Technologies Corp., 487 U.S. 500, 101 L.Ed.2d 442, 108 S.Ct. 2510 (1988) 13

Brady v. Southern Ry. Co., 320 U.S. 476, 88 L.Ed. 239, 64 S.Ct. 232 (1943) 16, 17

Brock v. Caterpillar Inc., 94 F.3d 220 (6th Cir. 1996) 1, 3, 4, 6, 7, 8, 11, 12, 13, 14, 15, 18

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993) ..... i, 9, 14, 15

Ford Motor Co. v. Fulkerson, 812 S.W.2d 119 (Ky. 1991) ..... i, 6, 10, 12

Gasperini v. Center for Humanities, Inc., __ U.S. __, 135 L.Ed.2d 659, 116 S.Ct. 2211 (1996) 13

Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 18 L.Ed.2d 75, 87 S.Ct. 1072 (1967) 13

Taylor v. Kennedy, 700 S.W.2d 415 (Ky.App. 1985) 17

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

KRS § 411.182(1) 5

KRS § 411.320(1) 2, 5, 6

United States Constitution Cited:

Seventh Amendment ..... i, 1, 9, 12, 13

Rules Cited:

Fed.R.Civ.P. 50 5

Fed.R.Evid. 403(b) 6, 9, 14

OPINIONS BELOW

The August 26, 1996 Opinion of the Sixth Circuit Court of Appeals is reported in *Brock v. Caterpillar Inc.*, 94 F.3d 220 (6th Cir. 1996). The December 8, 1993 Memorandum, Opinion and Order and the December 23, 1993 Judgment of the United States District Court for the Eastern District of Kentucky, London Division, are not published.

STATEMENT OF JURISDICTION

This Court has jurisdiction in accordance with 28 U.S.C. § 1254(1) to review the Opinion entered by the United States Court of Appeals for the Sixth Circuit on August 26, 1996, and the Order entered on October 28, 1996 denying the Petition for Rehearing and Suggestion for Rehearing En Banc.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Petition for Writ of Certiorari does not raise any legitimate constitutional or statutory challenges. The constitutional provision relied upon by Petitioner is the Seventh Amendment to the United States Constitution which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The state statute involved in the case is KRS 411.320(1) which provides:

> In any product liability action, a manufacturer shall be liable only for the personal injury, death, or property damage that would have occurred if the product had been used in its original, unaltered and unmodified condition. For the purpose of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. This section shall apply to alterations or modifications made by any person or entity, except those made in accordance with specifications or instructions furnished by the manufacturer.

COUNTERSTATEMENT OF THE CASE

This is a product liability action brought in the United States District Court for the Eastern District of Kentucky, London Division, by Gary Wayne Brock ("Brock") against Caterpillar Inc. ("Caterpillar") seeking damages for injuries sustained on June 20, 1990. (Joint Appendix, "J.A.", p. 24). Brock alleges that he was injured when the Caterpillar D9H bulldozer which he was operating on a steep incline lost its braking power. (J.A., p. 27). He contends that the bulldozer lost hydraulic pressure. (J.A., p. 164). He had never before that day operated the D9H. After the accident, the D9H bulldozer was tested and found to be functioning properly. It was driven back up the slope and thereafter continued in operation without further incident. (J.A., pp. 116-118).

At trial Brock relied upon the expert testimony of William Michael Cooper ("Cooper") to contend that the brake system on the D9H bulldozer was defectively designed because it would not lock up upon a loss of hydraulic pressure. (J.A., pp. 167-168). Cooper testified that if the D9H bulldozer had had a "fail-safe" braking system, the accident would not have occurred. (J.A., pp. 167-168). Cooper relied upon a subsequently designed braking system utilized by Caterpillar in other unrelated models to support his contention that the D9H bulldozer could and should have had a better braking system. (J.A., pp. 167-168).

When describing this evidence in the Statement of the Case in his Petition for Writ of Certiorari ("Petition"), Brock overstates Cooper's testimony. Through Cooper, Brock did not prove that the bulldozer involved in the accident "[f]reewheeled because it lost hydraulic oil pressure, so that the transmission would not supply power to the tracks." (Petition, p. 3). Brock did no more than establish a general unproven theory without any details as to what actually happened. As the Sixth Circuit noted:

> Cooper, was of the view that the machine lost hydraulic pressure causing a loss of boost to the brakes, but he could not indicate the reason for such failure. He admitted that inspection and testing of the machine after the accident revealed no physical evidence of loss of hydraulic pressure. Great Western, the owner of the equipment at that time, inspected the bulldozer and found nothing essentially wrong with the machine's mechanism. In fact, with minor repairs, the machine was used without adverse consequences for three years after the accident.

Brock v. Caterpillar Inc., 94 F.3d 220, 225 (6th Cir. 1996).

Brock in his Statement of the Case further overstates the evidence involving prior knowledge of alleged defects in the D9H bulldozer. Brock did not prove that Caterpillar "[k]new that this scenario was completely predictable". (Petition, p. 3). In contrast, the evidence revealed no known concerns about the D9H bulldozer either before or after Brock's accident. The D9H bulldozer operated by Brock was manufactured in 1978 and prior to Brock's injury was operated for twelve years without mishap. As the Sixth Circuit noted:

> In 1978, the D9H was concededly not "in violation of any applicable industry standards." There was no evidence that any competitor of comparable machines in 1978 produced them with disc type or so-called "fail safe" brakes.

Brock v. Caterpillar Inc., 94 F.3d 220, 225 (6th Cir. 1996).

Brock further distorts the evidence by arguing in his Statement of the Case that when the D9H bulldozer was manufactured, Caterpillar had a superior design, but chose not to use it on the D9H bulldozer. (Petition, p. 4). The evidence instead reveals that several years after the D9H bulldozer was manufactured Caterpillar utilized a different design on a larger machine, a D9L bulldozer and a much larger D10 bulldozer. (J.A., pp. 163, 173, 175). The Sixth Circuit compared the D9H bulldozer with the more recent models and found "a large number of changes in character, size, style, and technological advancement" between the models. *Brock v. Caterpillar Inc.*, 94 F.3d at 225. These changes alone did not establish that the earlier, unrelated, D9H bulldozer was defective.

The jury entered a verdict for Brock. (J.A., p. 30). Caterpillar, pursuant to Fed.R.Civ.P. 50, moved for a judgment as a matter of law. The motion was denied. (J.A., p. 31). Caterpillar appealed to the Sixth Circuit Court of Appeals ("Sixth Circuit"). The first issue addressed by the appellate court was whether or not KRS 411.320(1) provided Caterpillar with a complete defense to Brock's claims. KRS 411.320(1) provides that a manufacturer is liable only for personal injuries which would have occurred if the product had been used in its original condition. Since the jury found that the D9H bulldozer had not been properly maintained, Caterpillar argued that it should have been granted judgment as a matter of law under KRS 411.320(1). In response, Brock contended that the statute had been repealed. The Sixth Circuit, thus, certified the following issue to the Kentucky Supreme Court:

> Did KY.REV.STAT. ANN. §411.182(1) negate and/or overrule KY.REV. STAT. ANN. §411.320(1)?

The Kentucky Supreme Court responded that KRS § 411.182(1) did repeal KRS § 411.320(1). Caterpillar, therefore, could not rely on the complete defense established in KRS § 411.320(1).

In the Petition, Brock misrepresents the circumstances surrounding the certification proceedings by arguing that the Sixth Circuit prior to such proceedings was convinced that "Caterpillar was wrong", but thereafter changed its mind. (Petition, p. 4). The Sixth Circuit explained the reason for the certification proceedings:

> Brock argues that Kentucky's Comparative Fault Act, codified at KY.REV.STAT. ANN. §411.182, repealed §411.320(1) by implication. Because Kentucky has a

> substantial interest in the resolution of that question, we certified the following issue to the Kentucky Supreme Court in May of 1975:
>
> > Did Ky.Rev.Stat. Ann. §411.182(1) negate and/or overrule Ky.Rev.Stat. Ann. §411.320(1)?
>
> In response, the court unequivocally pronounced that "KRS 411.182(1) has repealed KRS 411.320(1)." Therefore, we have no choice but to reject Caterpillar's argument that §411.320(1) provides it a complete defense in this action.

Brock v. Caterpillar Inc., 94 F.3d 220, 223 (6th Cir. 1996). The certification proceedings addressed the isolated issue of the defense afforded by KRS § 411.320(1). Since the statute afforded a complete defense, enforcement of the statute would have been dispositive of the appeal. The fact that the Sixth Circuit certified the question to the Supreme Court has no other significance.

Following the certification proceedings, the Sixth Circuit addressed Caterpillar's challenge that Brock's expert, Cooper, should not have been permitted to testify about subsequently designed braking systems utilized by Caterpillar in other unrelated models. This testimony is erroneously referred to by Brock as evidence concerning "subsequent remedial measures". (Petition, p. 11). The Sixth Circuit found such testimony to be inadmissible under Fed.R.Evid. 403(b). *Brock v. Caterpillar Inc.*, 94 F.3d 220, 225 (6th Cir. 1996). The Court specifically rejected Brock's contention that *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991) permitted the introduction of such testimony, distinguishing *Fulkerson* on its facts. *Brock v. Caterpillar Inc.*, 94 F.3d at 225.

The Sixth Circuit then addressed the sufficiency of the evidence to support the jury verdict. *Brock v. Caterpillar Inc.*, 94 F.3d 220, 226 (6th Cir. 1996). The Sixth Circuit looked to Kentucky law in order to determine if Brock's evidence was sufficient to establish a product case:

> In establishing a defect in product design, a plaintiff must show something more than that it was "theoretically probable that a different design would have been feasible." *Ingersoll-Rand Co. v. Rice*, 775 S.W.2d 924, 928 (Ky.Ct.App. 1988). Under applicable Kentucky law in this diversity case, plaintiff must also demonstrate "more than that a particular injury would not have occurred had the product which caused the injury been designed differently." *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 70 (Ky. 1973) (quoting 63 Am.Jur.2d *Products Liability* §73, p. 79); *Rice*, 775 S.W.2d at 928-29.

Brock v. Caterpillar Inc., 94 F.3d at 224. The Sixth Circuit found Brock's evidence to be insufficient to support the jury verdict, holding: "[P]laintiff has failed to demonstrate a design defect under applicable Kentucky law." *Brock v. Caterpillar Inc.*, 94 F.3d at 226. The court reversed the judgment below. *Brock v. Caterpillar Inc.*, 94 F.3d at 226.

In the Petition, Brock grossly distorts the reversal arguing that the Sixth Circuit decided:

> Respondent Caterpillar was free to ignore safer designs being developed on its own drawing boards, by its own engineers, being made on its own production lines, being sold

> by its own dealers, and, that Caterpillar was free to continue to make and market a machine Caterpillar knew and admitted knowing could and would lose oil pressure, free-wheel downhill when it did lose oil pressure, and have no steering and no brakes when that happened, even though Caterpillar had a better design and production in its own plant.

(Petition, p. 5). There is no justification for this statement which is not supported by the record below. Quite the contrary, the Sixth Circuit found "[w]e find no direct evidence that the equipment operated by Brock, particularly its brake system, was inherently dangerous." *Brock v. Caterpillar Inc.*, 94 F.3d 220, 225 (6th Cir. 1996).

Brock sought a rehearing raising six questions, one of which was: "May this Court ignore evidence adduced on cross-examination when reversing the trial court's denial of a motion for J.N.O.V.?" In support of the issue, Brock argued that under the *state precedent*, the Sixth Circuit was required to review all the evidence, not just the evidence presented in the case-in-chief. Brock contended that the Sixth Circuit improperly limited its focus to the evidence in-chief, ignoring crucial testimony brought out on cross-examination.

The Sixth Circuit denied the Petition for Rehearing on October 28, 1996.

REASONS FOR DENYING THE PETITION

There are no compelling reasons to grant Brock's Petition which is premised upon numerous mischaracterizations of the evidence and proceedings below. When all of the rhetoric is

stripped away and the proceedings are accurately described, it becomes apparent that Brock has failed to make a requisite showing entitling him to review by this Court.

First, Brock argues that his Seventh Amendment rights were violated. This is a two-fold argument. Brock alleges that the Sixth Circuit's failure to follow Kentucky precedent violated his Seventh Amendment rights. Yet, the Sixth Circuit very carefully and appropriately distinguished the precedent relied upon by Brock. If in doing so, the court had misapplied the precedent, as argued by Brock, such action would not constitute grounds for granting the Petition. Brock asserts an additional Seventh Amendment challenge based upon the failure of the appellate court to remand for a new trial. In raising this challenge, Brock ignores the appellate court's finding that the evidence below was insufficient to support the jury verdict. Under such circumstances, a new trial would have been futile. These two issues combined do not create a constitutional challenge worthy of issuing the Writ of Certiorari.

Second, Brock raises the issue of whether *Daubert v. Merrell Dow Pharmeceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993) applies to expert testimony other than scientific testimony. Such issue is not appropriately reviewed in these proceedings inasmuch as the basis of the Sixth Circuit's ruling excluding a portion of an expert's testimony was not the *Daubert* standards, but instead Fed.R.Evid. 403(b). There is no ruling from the Sixth Circuit that *Daubert* does or does not apply to non-scientific expert testimony to be reviewed by this Court and thus no split amongst the Circuits to be reviewed herein.

Finally, Brock with an incredible lack of candor argues that the Petition raises the issue of whether the federal or state standard of review should be applied when reviewing a motion

for judgment as a matter of law. Again, this issue is not posed in these proceedings. Both the federal standard and the Kentucky standard of review require a review of the totality of the evidence. The Sixth Circuit, in compliance with both standards, found that the evidence was insufficient to support the jury verdict. Given such finding, the question as to whether the state standard or federal standard should be followed is merely an academic one, not justifying the granting of the Petition.

I.

THE SIXTH CIRCUIT DISTINGUISHED THE PRECEDENT RELIED UPON BY BROCK.

In order to create a constitutional argument out of whole cloth, Brock argues that the Sixth Circuit "did not apply Kentucky law as it existed, but applied the law as the Court of Appeals believed it should be." (Petition, p. 9). Accordingly, Brock contends that he has been denied his Seventh Amendment right to a trial by jury. The constitutional challenge must fail because the Sixth Circuit did not disregard any Kentucky precedent.

Brock relies upon *Ford Motor Co. v. Fulkerson*, 812 S.W. 2d 119 (Ky. 1991) to support his position, contending that the Sixth Circuit erred in finding evidence of unrelated design models used in subsequent years to be inadmissible. Brock informs this Court of his belief that *Fulkerson* requires the admission of such evidence. What Brock fails to disclose is that the Sixth Circuit specifically addressed *Fulkerson* and rejected its application:

> Nor, are we persuaded by *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky.1991), to the contrary. A divided court in that case held

> that evidence of a change in the *same model* Ford vehicle from the year 1984 to 1985 was admissible in a design defect case, holding, however, that the trial judge retained "power to consider whether evidence of little probative value 'may be more prejudicial than it would be helpful.' " *Id.* at 126. Under the circumstances of the instant case, we are satisfied that plaintiff's proof of later changes in another model should have been considered in light of Fed.R.Evid. 403. In our view, although this "comparison" evidence may be tenuously relevant, such relevance is outweighed by the prejudicial effect in this case because of the dissimilarities in the bulldozers that were the subject of the comparison. (emphasis in original).

Brock v. Caterpillar Inc., 94 F.3d 220, 225 (6th Cir. 1996).

The Sixth Circuit was meticulous in describing the dissimilarities between the subsequent D10 and D9L models relied upon by Brock and the D9H bulldozer in question:

> There were a large number of changes in character, size, style, and technological advancement between the manufacture design of the D9H in the early 1970's and that of the D10 some years later.

Brock v. Caterpillar Inc., 94 F.3d at 225.

> The D9H bulldozer had a six cylinder engine; the D10 bulldozer had a twelve cylinder engine. Caterpillar's engineer, Buie, testified

> that there was "no way physically to put the D10 braking system into the D9H tractor." The new D9L model made in 1981 weighed more than 57-1/2 tons (more than 20% heavier than the D9H model).

Brock v. Caterpillar Inc., 94 F.3d 220, 225 n. 10 (6th Cir. 1996). Evidence involving new designs in unrelated models is just not comparable to the evidence of a change (design change made in the same model during the following year) held admissible in *Fulkerson*. Instead, the Sixth Circuit found that the admission of Cooper's testimony was analogous "to allowing a plaintiff's expert to compare unfavorably the braking system on a 1974 Chevrolet made by General Motors with that company's 1978 Cadillac automobile." *Brock v. Caterpillar Inc.*, 94 F.3d at 225.

Brock's argument is thus no more than a challenge that the Sixth Circuit misapplied *Ford Motor Co. v. Fulkerson*, 812 S.W. 2d 119 (Ky. 1991). This argument has no constitutional ramifications and does not support granting the Petition.

II.

THE SIXTH CIRCUIT DID NOT ORDER A NEW TRIAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY VERDICT.

Brock's second Seventh Amendment challenge, based upon the failure of the Sixth Circuit to direct a new trial, is equally faulty. The long-standing precedent of this Court supports such procedure where the evidence is insufficient to support a jury verdict.

This Court has long endorsed the practice of granting a reversal, without additionally remanding for a new trial where

the evidence is insufficient. *See Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 79 L.Ed. 1636, 55 S.Ct. 890, 892 (1935). The constitutional challenge to such procedure raised by Brock was specifically and unequivocally rejected by this Court in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 18 L.Ed.2d 75, 87 S.Ct. 1072, 1076 (1967):

> As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.*

The Seventh Amendment simply does not require the granting of a new trial every time a jury verdict is reversed.

> If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, judgment could properly be entered for the respondent at once, without a new trial.

Boyle v. United Technologies Corp., 487 U.S. 500, 101 L.Ed.2d 442, 108 S.Ct. 2510, 2519 (1988). *See also Gasperini v. Center for Humanities, Inc.*, __ U.S. __, 135 L.Ed.2d 659, 116 S.Ct. 2211, 2224 (1996).

The Sixth Circuit Opinion is in full accord with this precedent. The court found "[i]n the instant case, relevant and admissible evidence was insufficient to establish a defective product." *Brock v. Caterpillar Inc.*, 94 F.3d 220, 226 (6th Cir. 1996). No purpose would be served by ordering a new trial when it is evident that Brock as a matter of law cannot prove his case.

III.

THE SIXTH CIRCUIT DID NOT APPLY THE *DAUBERT* STANDARDS TO NON-SCIENTIFIC EVIDENCE.

Brock argues that the Sixth Circuit applied the standard set forth by this Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993) improperly to a witness who was not providing scientific evidence. (Petition, p. 12). Brock objects to the exclusion of Cooper's testimony regarding the subsequent designs of the D10 and D9L models. Brock contends that this testimony is not scientific and thus should not have been excluded under the *Daubert* standards. Since the Sixth Circuit did not base its ruling on the *Daubert* standards, this issue is not ripe for review.

The Sixth Circuit did not apply the *Daubert* standard to exclude Cooper's testimony, but instead applied Fed.R.Evid. 403(b) to hold the evidence inadmissible. Specifically, the Sixth Circuit found:

> We find error, however, in allowing him to testify as to the comparison between Caterpillar's bulldozers that were substantially different or marketed and sold at a considerably later time. It was noted in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) that "[e]xpert evidence can be both powerful and quite misleading . . . Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."

Brock v. Caterpillar Inc., 94 F.3d 220, 226 (6th Cir. 1996).

The Sixth Circuit's quote from *Daubert* is by its terms equally applicable to all experts regardless of whether the testimony is labeled "scientific".

The Sixth Circuit resolved the question of the admissibility of Cooper's evidence outside the context of the *Daubert* standards:

> Under the circumstances of the instant case, we are satisfied that plaintiff's proof of later changes in another model should have been considered in the light of Fed.R.Evid. 403. In our view, although this "comparison" evidence may be tenuously relevant, such relevance is outweighed by the prejudicial effect in this case because of the dissimilarities in the bulldozers that were the subject of comparison.

Brock v. Caterpillar Inc., 94 F.3d 220, 225 (6th Cir. 1996). Brock's discussion of the types of experts to which the *Daubert* standards apply is, accordingly, purely academic. If that issue is to be addressed by this Court, it should be done where there is a ruling of the lower court addressing it. There is no such ruling below.

IV.

BOTH THE STATE AND FEDERAL STANDARDS OF REVIEW REQUIRE A REVIEW OF THE EVIDENCE IN ITS ENTIRETY.

Brock's contention that this Court should grant the Petition in order to address the proper standard for reviewing motions for judgment as a matter of law is completely lacking in candor.

Brock argues before this Court that the standard set forth in *Brady v. Southern Ry. Co.*, 320 U.S. 476, 88 L.Ed. 239, 64 S. Ct. 232 (1943) was violated by the Sixth Circuit which considered only Brock's expert's evidence and ignored the evidence brought out on cross-examination. (Petition, p. 14). This error according to Brock resulted from the Sixth Circuit applying the state standard of review. Implicit in Brock's position is that there is a distinction in this regard between the standards of review. As Brock's own pleadings reveal, there is no distinction and, therefore, no basis for granting the Petition.

In his Petition, Brock writes:

> In the instant case, the Sixth Circuit Court of Appeals, in applying the above Kentucky standard, considered only the evidence adduced by the Plaintiff's expert, and did not consider evidence adduced on cross-examination.

(Petition, p. 15). Oddly, before the Sixth Circuit, Brock's argument was that under the Kentucky precedent by which the Sixth Circuit was governed, the Sixth Circuit was required to review all of the evidence:

> As can be seen from a review of the above authorities, the standard for reviewing the trial court's denial of a motion for judgment as a matter of law is quite strict, and mandates a review of **all** the evidence presented at trial. (citations omitted). In its review of the decision of the trial court in the instant case, this Court reviewed only the evidence presented by Plaintiff's expert. **This Court did not review the evidence presented by**

> **the Plaintiff through cross-examination, as is required when reviewing a denial of a motion for judgment as a matter of law.** (citations omitted) (emphasis in original).

(Petition for Rehearing, pp. 4-5). Obviously, Brock's argument is the same regardless of which standard applies.

The state standard of review is set forth in *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985):

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ. (citation omitted).

Absent from Brock's Petition is any authority that this standard of review requires any scrutiny different from that authorized in *Brady*. Brock does, of course, contend that this state standard allows the court to ignore evidence brought out on cross, yet absent from both the federal and state precedent relied upon by Brock during the appellate process is any discussion of evidence in-chief as contrasted with cross-examination. Both standards simply refer to "the evidence".

The validity of Brock's challenge is further diluted by the revelation that the Sixth Circuit did not confine its review to Cooper's testimony. The dissenting opinion filed by Judge Keith, which includes references to evidence brought out on cross-examination, dispels any alleged doubt over the thoroughness of the Sixth Circuit review. *Brock v. Caterpillar Inc.*, 94 F.3d 220, 227 (6th Cir. 1996). Under such circumstances, the application of one standard of review over another provides no basis for granting the Petition.

CONCLUSION

Brock has failed to raise any compelling reasons for granting the Petition for Writ of Certiorari. There are no constitutional issues or conflicting rulings amongst the Circuits to be addressed in these proceedings. Caterpillar, accordingly, respectfully urges the Court to deny the Petition.

Respectfully submitted
this 7th day of March 1997,

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